

Document Review
Learning a New Discipline All Over Again

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Introduction. This introduction handout is intended to act as a guide to the oftentimes complex field of document review. Obviously, as an introduction, it is not intended to be a complete guide, but, rather, introduce key concepts to better equip the lawyer who must conduct a document review. While there is little doubt that document review accounts for a major portion of any major litigation total spend, it rarely receives individualized attention outside of vendor pitches. Instead, commentators and courts are often asked to decide eDiscovery questions. In addition, resource issues and staffing questions, such as off-shoring document review tasks to very inexpensive solutions, are often more discussed than the practicalities of conducting a reasonable and efficient document review.

This paper is intended to address some of the challenges and opportunities in document review specifically. To do that, we will address some of the common issues, define a successful document review, introduce when document review begins, and then discuss some of the technical issues that must be considered in the front end of a document review. In addition, we provide a document review checklist that shows different decisions that are made as a document review moves forward.

Should you have any questions, feel free to follow-up with either of us.

Where we Have Been. Most lawyers groan when they hear they have to conduct a document review. This should raise some questions.

Why do they have that reaction?

Why do clients equally dread the topic?

The reactions vary, largely based on the **experiences** of the listener. And, the considerations range from the logistics of paper, to the volume of electronically stored information (ESI), to the costs involved, to project management. Issues and experiences that come top of mind include:

- **Paper Logistics**, including boxes of documents, coupled with tedious Bates stamps, copy service hassles, manual redactions, warehouses and dusty crawl spaces;
- **Review Tool Challenges** covering modern Internet based programs and deciphering document categories and tagging;
- **Litigation Adversity**, such as missed deadlines and challenges from the opposing parties;
- **Privilege Concerns**, like inadvertent production of privileged documents and the scope of the resulting waiver;
- **Technological Underpinnings**, such as issues of what to collect, from whom, and how much data will be involved;

- **Vendor Selection** involving selecting a good and rational partner and what program should manage the data once found;
- **Cost**, which is the paramount concern and must be balanced with the needs of the case, the resources of the parties, and the importance of the data to those questions;
- **Managing a Team**, which recognizes that large volumes of ESI oftentimes require the effort of teams of lawyers; and
- **Finality**, considering how to drive the production efforts to a meaningful and final result that withstands scrutiny.

Just to name a few. All of these considerations are very different. But all relate to a main theme. It is that theme that is the subject of this review and CLE.

The Main Theme. The theme of the modern document review is remarkable in the simplicity of its explication:

The goal of a document review is to get to a defensible, cost-effective and final document production.

Of course litigants review documents that are produced to them by opposing litigants and third parties. But, here, we are using ‘document review’ in the sense of reviewing documents for the purpose of producing documents to another party. As such, this main theme points to the obvious fact that a document review’s purpose is to review in order that you can produce.

While simple to state, there are **three** inherent issues, each a separate prong of the overall purpose. Each deserves separate treatment:

1. **Defensible.** A document production must be reasonably responsive, and not generally a data dump of everything. It should meet the substance of the unobjectionable document requests, which form the parameters of the scope of what should reasonably be searched. It should be able to be explained, albeit the level of detail and transparency is discretionary with the producing lawyer, and almost always driven by a desire to reach finality on topics 2 and 3. In short, a document review should be reasonably capable of being defended against attacks on its completeness.
2. **Cost-Effective.** To be considered successful, a document production must also meet the budgetary needs of the case, considering the needs of the litigants, what is at issue, and what resources the parties have at their disposal. Thus, the level of proportionality is subject to agreement of the parties, or the discretion of the judge

(in the context of motion practice). But, overall, cost drives client and lawyer decisions in moving forward with various technical and staffing options.

3. **Final.** To be successful, a document production must also reach a point where it is complete. This is that point at which the opposing party is not seeking more information, and reasonably believes that the information that matters has been produced. Until the production is complete, there is always a possibility that more costs are to come. Thus, finality is critical and means that the universe of responsive documents has been reasonably searched for, identified, and produced.

One goal cannot be elevated above the others and all must be considered in conjunction with the others. Too often, document reviews are started hastily with well-intentioned litigators, acting under time pressures, trying to quickly reach finality. These often end with blown budgets or attacks from opposing counsel. Other reviews suffer from a lack of tracking decisions, and a resultant inability to explain and defend the production. Such reviews are attacked as insufficient and, therefore, cannot reach finality without additional and duplicative spending. If the right resources are not marshaled at the beginning because of unreasonable budget constraints, efforts oftentimes must be repeated (with the resultant delays and cost issues).

Therefore reaching the main goal requires a carefully executed plan, proper tracking, technical proficiency, and careful and realistic budgeting.

Where Document Review Begins? Considering the issues, and the theme, how do we reach conclusion on a document production? It requires the coordination of several disciplines and steps. As a predicate, we are assuming that the proper eDiscovery steps have been taken. This means that the client's IT staff were interviewed, ESI was identified and preserved, custodians were interviewed, data was defensibly collected, and targeted collections were identified. These stages of the production must also be defended.

Clearly the eDiscovery steps identified in the preceding paragraph relate to and greatly impact your document review. Document review can be – and often is – iterative with your eDiscovery efforts. By way of example, in a search term decision, you need to be aware of the data sources being searched so that your terms match the data source. Searching for ‘compliance’ may make sense in the President’s mailbox, but will lead to a lot of noise in the Security Officer’s data. Likewise, you can have an iterative or rolling production that starts with certain custodians and then, based on what is found, adds additional persons of interest.

So, what is the line where eDiscovery ends and document review begins? This point may be described differently depending on who you talk to. However, one clear and discernible point emerges that we advocate as the starting point:

Document review begins, and eDiscovery ends, when the data set is known and situationally complete.

Prior to this known data set, you are making eDiscovery decisions based on the probability of *the data set* including responsive information. For instance, in eDiscovery, you must locate the subsets of data that would most likely have responsive, non-redundant materials. This can be based on custodians, group shares, structured data, or other sources, but focuses on the repositories to be collected and potentially reviewed. This is a *probability analysis* that can be based on a variety of factors, including: interviews of custodians and IT professionals; sampling; experience; data type; volumes; search terms; and a host of other considerations.

These broad eDiscovery decisions, however, always lead to some portion of data that requires more individualized attention.

At that point, it is necessary to review and substantively analyze for both responsiveness, importance, and privilege, the *discrete and individual* documents in the data set. In some way, when that initial data set is known, you are applying learning (whether human or machine) to the data set to determine whether an individual document matters.

Expounding on these concepts:

- The data set is **known**: a known data set is one that can be defined. It is this [x] number gigabytes that we need to find the responsive documents, the privileged documents and, coupled with that, layer in some analysis of the relative importance of the documents to the issues involved in the matter.
- The data set is **situationally complete**: iterative reviews are a part of modern complex litigation. But, within that iterative process, you will have some certainty as to portions of the bigger set that will need to be analyzed and reviewed. That is situationally complete.

The Key Players in a Document Review. Every document review has a core team of people supporting it. From the smallest to the largest, the players remain relatively consistent. In our experience, the following almost always support a document review: (a) the substantive expert; (b) the technical expert; (c) the project manager; and (d) the frontline reviewer. These are further explained:

- a) **The Substantive Expert.** Someone has to know the case, the issues, and law involved in the facts. This is usually the lawyer who is drafting the pleadings, handling the motions, and responding to the discovery. The substantive expert's role is to guide the review, identify the issues, and ensure that the team understands the needs of the case in formulating their review strategies.
- b) **The Technical Expert.** Someone has to technically support the review. In the days when reviews were mostly paper, this was the paralegal—the repository of the charts showing where things came from; who applied Bates stamps and ensured tracking; and who helped keep the originals safe from alteration. In modern ESI reviews, somebody has to take data from the client and make it available for review. In the most simple exercise, it could be loading email into a safe native environment for review, a task sometimes performed by paralegals or IT professionals. In a more complex matter, it may be an outside vendor hosting

the data for online review. But, regardless, someone has to provide this technical organization and review assistance.

- c) **The Project Manager.** Someone has to manage to a deadline, and provide organization to the review. While the substantive lawyer may not recognize it, if you are instructing a review, making decisions about how to code documents, or projecting cost or review rates, then you are acting as the project manager. This is often overlooked, but is a critical component of a document review. This person is reviewing the project from both a human staffing, as well as a technical implementation standpoint. Oftentimes, the project manager will need to be overseeing the frontline reviewers, the project management team from the technical expert, as well as interfacing with the substantive team member about scope and direction issues.
- d) **The Frontline Reviewer.** Someone has to make decisions about documents, both in terms of responsiveness, privilege and importance. This is often a resource question – who should do this review, at what cost, and with what training. Here, you can consider using non-traditional review attorneys (contract lawyers) who review documents as their full-time profession.

Each of these roles are critical to the success of the document review. Before discussing further, it is important to note that these roles can (and oftentimes do) blend in actual implementations. Separate from opining on the advisability of it, substantive lawyers often de facto act as project managers. Paralegals often step into the role of technical support or project managers. Substantive experts often review documents in the case. But, while you may see multiple roles being done by one person, each of the roles is filled.

One point to consider in this, however, is the substantial difference between each of these roles. Therefore, while this blending of roles can have limited “success” in the smaller cases, it is rarely a recipe for success in a larger document review context. The substantive lawyers have to make general decisions about the scope of the review, what is important, what is responsive, and they tend to be more senior associates or partners. Oftentimes, they do not have the bandwidth to manage the review from a project standpoint, or they can be very slow frontline reviewers. Likewise, the project manager oftentimes is best situated to choose the technical expert, but may not be the best situated to actually implement the technical solution itself.

In essence, document review stands at intersection. It is right past eDiscovery, but never distant from it. And, it requires the interface of substantive knowledge, technical proficiency, project management, and heads-down document-by-document decision making.

In short, modern document review of large sets of ESI is not for the faint-of-heart. This introduction will now cover three important and related topics: (1) project management as a key factor in all document reviews; (2) review staffing services, almost exclusively relating to frontline review; and (3) technical vendor decisions that impact your document review processes.

A Note on Project Management. Lawyers oftentimes struggle with the concept of project management because it sounds sterile and non-legal. The fact is clear, however, that

lawyers *must* project manage a document review in some fashion. This project management is one that scopes carefully on the front end to avoid pitfalls down the road. It manages resources to budget and deadlines. It ensures that variances (such as added data or new issue codes) are understood from a planning standpoint, as well as the impact of those changes on the budget and deadlines. Good project management also learns from experience and applies those lessons prospectively.

Project management seems like a choice, but, in fact, in the context of a document review it is absolutely necessary. Even the choice of having no project manager. In that case, someone, whether vendor or lawyer, is project managing, albeit the quality may not be as high. But, someone has to do some minimal degree of project tracking; someone has to match resources to deadlines, needs, and expertise; someone has to consider quality controls, even if they are simply not done. Experience has taught that effective, experienced and knowledgeable project managers will greatly lessen the burden of a document review.

A Note on Staffing Vendors. Staffing vendors that provide contract document reviewers are not new or novel. Staffing companies make money by loaning out reviewers and review facilities for professional document reviews. While the reality is that this topic is one that could easily comprise a chapter book, we will generally introduce what we see as the top four favorable qualities of a staffing vendor, in order of importance:

- ***Care for the Reviewers.*** Document review professionals are most effective when they have personally chosen that career path. Those professionals will gravitate to a vendor that treats them like a professional. Make no mistake about the fact that review lawyers are not interchangeable; finding and retaining excellent review lawyers should be the primary focus of your review staffing vendor.
- ***Core Competency.*** The review shop should not have document review staffing services as an add-on to a multitude of other service offerings that are the vendors true focus. Rather, the vendor should be focused on document review as a core competency.
- ***Demonstrated Best Practices.*** The blocking and tackling of document review often occurs at the quality control level. An experienced document review staffing company should be able to articulate a particular quality assurance approach. And,
- ***Ability to Specialize.*** Certain reviews benefit from certain experience in the reviewers, like employment, patent, or intellectual property experience.

A staffing company should also mind potential conflicts, work well with outside and inside counsel, and be responsive to project changes.

A Note About Technical Vendors. Have you surveyed the eDiscovery vendor marketplace recently? It is a difficult place to navigate if you are unfamiliar with the players, what they are selling, and the different eDiscovery and document review services that they offer

(and the variety of selling models). Attached as **Appendix A**, as an example, is an overview of the types of vendors.

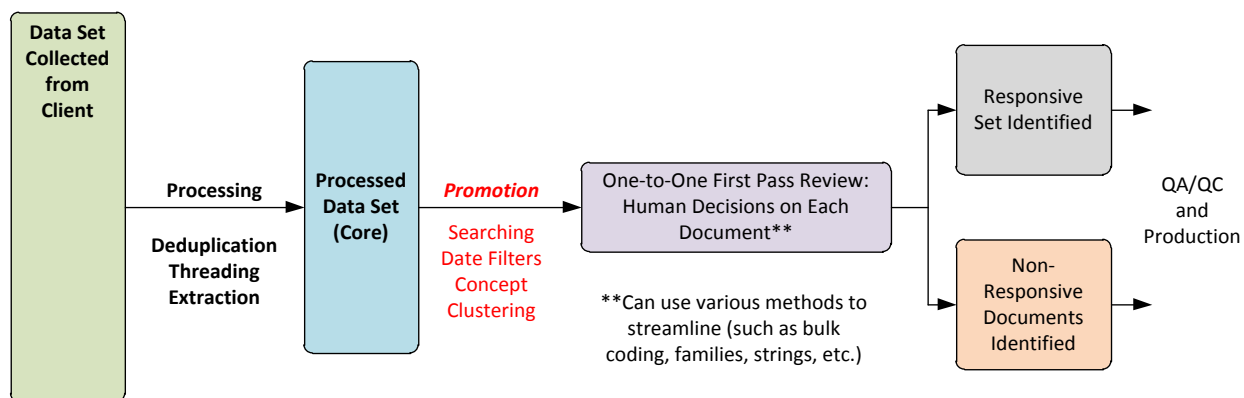
The retention of the document review vendor is one of the critical junctions of the document review process. The technical capabilities of the review platform will be determinative of the review processes employed. For instance, if your review tool has predictive coding capabilities, then you can leverage those capabilities in your review; if your tool has strong early case assessment concept clustering, organization and searching features, those can be leveraged; if your vendor provides proprietary workflows that can be used to winnow the data set, then those need to be analyzed and reasonably employed.

Obviously, there are two large buckets of cost drivers in any large ESI document review: (a) the technology costs, and (b) the review attorney time. These two need to be managed together to reach an overall project cost that is the most reasonable that it can be. Oftentimes, clients and lead lawyers are too focused on one or the other. However, choosing the wrong technology because it is inexpensive can dramatically increase the lawyer review time because of document load lag, insufficient searching tools leading to larger review sets, *etc.* Moreover, over-spending on review technology by buying too much is never advisable.

These complex decisions need to thoughtfully and carefully be made based on the size of the data to be reviewed, the likely review best practices that will be employed, the relative costs and rewards of particular workflows, and the adversarial environment of the underlying matter. By way of further explanation:

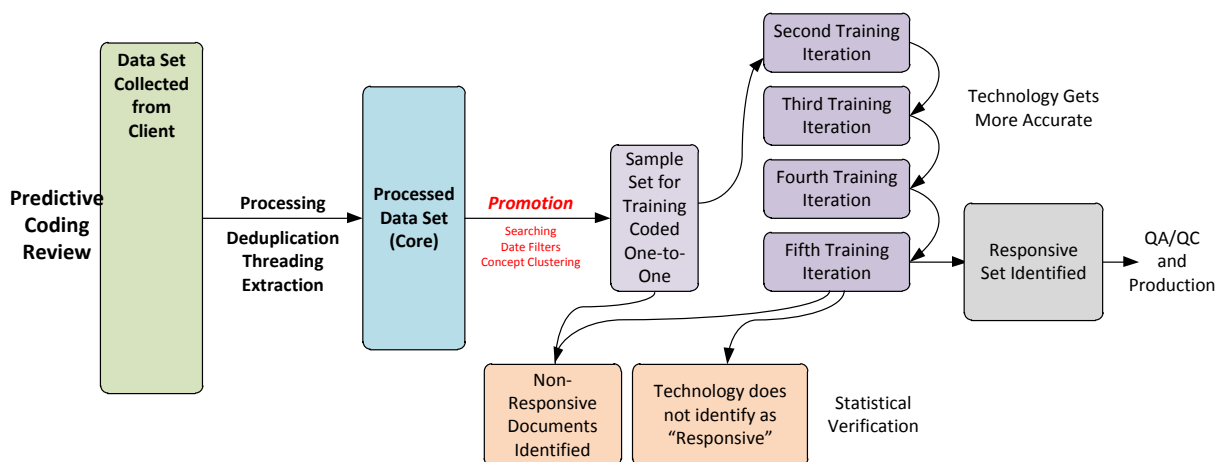
- **Data Volume.** The larger the dataset, the more likely that powerful tools will bring value. Smaller datasets, however, may call for less expensive tools.
- **Review Best Practices.** What is the experience of the reviewers in terms of what resources they are comfortable with, and how the review will be executed. If your review team is not comfortable with a particular technology, it may be difficult to execute against it.
- **Relative Costs and Rewards of Workflows.** The workflow that will be employed – particularly in the context of more powerful analytics – is an essential frontend question that will guide the technology determinations.
- **Adversarial Environment.** Is your opponent open to a non-traditional workflow, or will it likely challenge anything you do? These questions are critical to the technology determinations.

By way of example, there are many different types of workflows. In a traditional “linear review” – meaning document-by-document – the following is a general workflow:



As depicted, the workflow starts with the identifiable and situationally complete data set. After processing at the vendor, search criteria are applied to the dataset and a subset of potentially responsive documents are identified. Once that set is found, it is then reviewed by the frontline reviewers, with direction from the substantive team, and organized by the project manager. The technical tools can still be leveraged to streamline the review, for instance concept clustering, email threading, family tagging, etc. Moreover, note that all reviews need some kind of quality assurance and quality control – oftentimes aided by the substantive lawyers.

An alternative workflow leverages predictive coding. For example, one predictive coding workflow possibility is the following:



Note how different the technology makes the workflow. It is leveraging “learning technology,” oftentimes referred to as “technology assisted review (TAR)” or “predictive coding.” In this workflow, a core database is identified, and then a sample iteration is reviewed for responsiveness and privilege. The technology then “learns” from those decisions, and predicts what other information may be responsive based on complex algorithms and document properties.

The point here is not to overcomplicate, advance a particular workflow, or advocate the use of predictive coding. It is much simpler. This section is intended to introduce the concept that the technical workflow can (and will) cause particular decisions around the actual review.

Normal Project Timeline. With these considerations all in mind, the following chart shows some of the normal considerations that must be had between the various document review players. Obviously, this is just a general construct, and experience and substantive knowledge must be applied to this general construct.

EVENT	ACTIVITIES
Intake Call	Substantive team and Project Manager to discuss: <ul style="list-style-type: none"> • Case background & posture of parties involved • Volume and type of data • Status of data - ready for review • Timeframes; review kick-off; production deadline • Production format and technical considerations • Review tool and vendor selection • Predictive coding or linear review • Custodians • Deduping and denisting • Search terms • Date filters
Project Logistics Call	Substantive team and Document Review Manager to discuss: <ul style="list-style-type: none"> • Pleadings; case materials • Review Protocol • Workflow • Review team size • Upcoming orientation • Key term searching and highlighting • Potentially privileged terms searching and highlighting • Redactions- PHI, CBI, etc.
ECA/EDA	Keyword searching and validation; culling; prioritization
Review Set-up	<ul style="list-style-type: none"> ▪ Create the review protocol and workflow ▪ Work with the technology vendor to set up coding panel ▪ Decide on number of tags
Test Review Protocol; Sample Documents	Compare technology with protocol <ul style="list-style-type: none"> • Is everything working as expected? • Does anything need to be adjusted?
Review Tool Set-up	<ul style="list-style-type: none"> ▪ Obtain login credentials for review team ▪ Activate persistent highlighting ▪ Create batches
Case Orientation	Train review team: <ul style="list-style-type: none"> • Case background • Review protocol • Theory of case • Lines of communication for Q&A • Batch release schedule

Technology Training	Review tool training or refresher: <ul style="list-style-type: none"> • Login • Tagging • Searching • Redacting • Reporting
Review	<ul style="list-style-type: none"> ▪ Substantive attorney available to answer questions from review team in a timely manner ▪ Decision Log created compiling all Q&A, clarifications, and changes sent to substantive team for approval, then distributed to review team ▪ Daily Reports with review metrics and responsiveness data ▪ Daily or weekly update calls scheduled to ensure communication
QC and feedback	Immediate QC of initial batches in order to provide timely feedback to the review team and address any potential coding issues

Some additional information is included in **Appendix B**, that has a workflow model to consider.

DISCLAIMER

All eDiscovery projects and cases are different and have a variety of considerations and issues inherent in them; all vendor decisions, likewise, are case-by case. As such, this summary information is designed to help catalogue relevant inquiries and topics, and provide examples of common issues and considerations – but not all issues. This material is given with the understanding that neither it, nor the presenter, is rendering legal advice or services with respect to specific facts or circumstances. Laws and standards are constantly changing, and each procedure, law, regulation, rule or standard should be checked for its current version and knowledgeably applied to the facts or circumstances involved.

APPENDIX A

NAVIGATING THE EDiscovery INDUSTRY (AND ITS PLAYERS)

	PARTNER	SELLING	SALES TOPICS	LOOK FOR THIS	TESTIMONY SUBJECTS
COMPUTER FORENSICS	CSI	Expertise: finding information and determining patterns	Spoliation; private investigation capabilities; data theft; forensic stories	EXPERIENCE <ul style="list-style-type: none"> Variety of certifications Variety of software Testimony 	Potentially substantive or procedural, verify professional methodology and support conclusions
STAFFING SERVICES	PEOPLE	Managed Review Services: reduced rate legal services, project management, first pass review	Cost of traditional first pass review; decision rates and quality; training and quality assurance and quality control expertise	QUALITY <ul style="list-style-type: none"> Review staff Metrics maintained Project managers QA/QC Procedures 	Review management, likely because of inadvertent production (because of human error), quality controls
RE-SELLERS / BUNDLERS	PROCESS	Processes and Capabilities: resell software, interweaving its own best practices, data handling and process controls	Experience with particular software; project management; reduction on burden for internal IT (who could implement same software)	PROVEN EXPERTISE <ul style="list-style-type: none"> Time in business / growth Leadership “Right” software People you will deal with 	Data management and authentication, could be inadvertent production (because of technological error)
PROPRIETARY	BLACK BOX	Processes and Technology: proprietary technology deeply integrated with people and processes	Scalability; knowledge of their processes and technology; responsiveness; uniqueness	VERIFICATION OF CLAIMS <ul style="list-style-type: none"> Current health of business Prestige and reliability Pricing model Actual value added 	Blend of the topics listed for the re-sellers / bundlers and pure software
PURE SOFTWARE	TOOLKIT	Technology: design and sell technology that “solves” a particular problem to be implemented by you or someone else	Situations which are the inverse of the problem that the technology was developed to address	RISK – REWARD SPECTRUM <ul style="list-style-type: none"> “Time on Target” (business or e-discovery issues) Relevance of software feature set Scalability / reliability 	Reliability and proven capability of the software’s features; if on the bleeding edge, your case could be the litmus test for the viability of the technology/application generally
BLENDED	YOUR ONLY	Packages: blended services of all the above, aspire to be a one-stop-shop (end-to-end)	Close partnership with you and synergies of having consulting and technology blended in one	RELIABILITY <ul style="list-style-type: none"> Hidden connections with other vendors How they got there 	Anything listed above

TOP TEN eDISCOVERY VENDOR QUESTIONS

1. What eDiscovery problem or issue did your company set out to fix or make better?
2. What technology or service are you selling? Does it involve, directly or indirectly, reselling someone else's technology or services?
3. Who do consider to be your three (3) most direct competitors?
4. What makes you different or better than others companies selling the same thing?
5. Who are your top five (5) clients and would they give you a reference?
6. How long have you been (a) in business and (b) in the eDiscovery space regarding this particular issue?
7. What is your overall strategy for quality control / quality assurance procedures?
8. Has your product ever been the subject of challenge or testimony? What outcome?
9. Who will be my point of contact, will that change, and what does it cost?
10. What is the average size of your matters in an applicable measurement?

APPENDIX B

